UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROGER G. DAIGLE, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBERS NY-0752-98-0362-I-1 NY-531D-99-0085-I-1 DATE: December 28, 1999

Roger G. Daigle, East Syracuse, New York, pro se.

Mark Antinelli, Syracuse, New York, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a concurring opinion.

OPINION AND ORDER

¶1 The agency has filed a petition for review and the appellant has filed a cross petition for review of the December 11, 1998 initial decision that reversed the agency's decisions to remove the appellant and to withhold a within grade increase (WGI). For the reasons set forth below, we DENY the appellant's cross petition, GRANT the agency's petition with respect to the WGI, REVERSE the initial decision with respect to the WGI, and AFFIRM the remainder of the initial decision.

BACKGROUND

¶2 The appellant was employed as a Medical Clerk, GS-04, at the agency's Medical Center in Syracuse, New York. Initial Appeal File (IAF), Tab 5, Subtab 4N. On October 21, 1996, the agency proposed the appellant's removal from federal service based on charges of a threat to inflict bodily injury upon another agency employee and disrespectful conduct toward agency personnel. IAF, Tab 5, Subtab 4X. In support of these charges, the agency alleged that during the course of an Equal Employment Opportunity (EEO) counseling session on September 17, 1996, the appellant, while referring to the Medical Center Director, made comments to the effect that "If I wasn't a sane man, I'd take a weapon and blow the motherfucker's brains out." IAF, Tab 5, Subtab 4CC. On October 30, 1996, the agency also notified the appellant that he would not receive a WGI for which he became eligible on October 27, 1996. IAF, Tab 5, Subtab 4O. The agency denied the appellant's request for reconsideration of this decision on December 30, 1996. IAF, Tab 5, Subtab 4J.

¶3 On February 13, 1997, the appellant filed formal Equal Employment Opportunity (EEO) complaints regarding his removal and the withholding of the WGI. IAF, Tab 34, Initial Decision (ID) at 2. The agency issued its final decision on the appellant's discrimination complaints on June 12, 1998. IAF, Tab 5, Subtab 4A. The appellant thereafter filed an appeal with the Board. IAF, Tab 1. Because the appellant appealed both his removal and the denial of the WGI, the Board's regional office docketed the appeal under two different numbers. ID at 1 n.1.

¶4 Following a hearing, the administrative judge issued an initial decision in which he reversed the agency's decision to withhold the WGI, finding that the agency failed to prove that it withheld the appellant's WGI under a performance appraisal system approved by the Office of Personnel Management (OPM). ID at 4. The administrative judge also reversed the appellant's removal, finding that the

agency failed to prove the misconduct charges. ID at 7, 8. The administrative judge also found, however, that the appellant failed to prove his affirmative defenses of gender discrimination, reprisal for prior EEO activity, retaliation for whistleblowing, and harmful error. ID at 10, 15, 19, 21. The agency filed a petition for review in which it contests the administrative judge's findings with respect to the misconduct charges and the denial of the WGI, and the appellant filed a cross PFR in which he contests the administrative judge's findings with respect to his affirmative defenses. Petition for Review (PFR) File, Tabs 1, 5.

ANALYSIS

The misconduct charges.

¶5 On petition for review, the agency argues that the administrative judge incorrectly applied the *Metz* criteria in determining whether the appellant's statement amounted to an actionable threat. PFR File, Tab 1 at 2; *see Metz v. Department of the Treasury*, 780 F.2d 1001, 1004 (Fed. Cir. 1986) (in deciding whether statements constitute threats, the Board is to apply the reasonable person criterion, considering the listeners' reactions and apprehensions, the wording of the statements, the speaker's intent, and the attendant circumstances). The initial decision, however, identified the proper factors and contained a detailed discussion of the *Metz* factors in support of the administrative judge's finding. ID at 5-7. Because the administrative judge properly identified and weighed the appropriate factors, we discern no error in his finding that the agency failed to prove that the appellant made an actionable threat against his supervisor.

The disrespectful conduct charge.

¶6 The agency also argues that the administrative judge erred by failing to sustain the disrespectful conduct charge. PFR File, Tab 1 at 4. Although the Board has noted that "Disrespectful conduct as manifested by the use of abusive language is unacceptable and not conducive to a stable working atmosphere," *Wilson v.*

Department of Justice, 68 M.S.P.R. 303, 310 (1995), the Board also considers the context in which inappropriate comments are made to determine whether the comments constituted misconduct and to determine whether the penalty imposed for such misconduct is reasonable. *See, e.g.*, *Larry v. Department of Justice*, 76 M.S.P.R. 348, 358 (1997) (comments made during psychotherapy); *Armstrong v. U.S. Postal Service*, 28 M.S.P.R. 45, 50 (1985) (comments made during a sexual harassment training session in which the instructors encouraged comments and feedback); *Farris v. U.S. Postal Service*, 14 M.S.P.R. 568, 574 (1983) (noting that employees generally may not be discharged for rude and impertinent conduct in the course of presenting grievances). Given the fact that EEO counseling sessions are a semi-confidential means through which employees complain about the conduct of other agency personnel, *see* 29 C.F.R. § 1614.105, and the fact that complainants are likely to be emotionally distraught when they are reporting perceived discrimination to the EEO counselor, these sessions are one of the contexts in which it is reasonable to afford employees more leeway with regard to their conduct than they might otherwise be afforded in other employment situations. We note that the appellant was not referring to the counselor when he used abusive language during the counseling session. In these circumstances, we do not find that the administrative judge erred by failing to sustain the disrespectful conduct charge.

The appellant's affirmative defenses.

¶8 On cross petition for review, the appellant raises several arguments concerning his affirmative defenses, but these arguments fail to establish that the administrative judge erred with respect to his findings concerning the appellant's affirmative defenses. For example, with respect to his gender discrimination claim, the appellant argues that the administrative judge failed to consider the fact that he was subject to a hostile working environment when he witnessed the Medical Center staff abusing male patients. PFR File, Tab 5 at 1; *cf. King v.*

Hillen, 21 F.3d 1572, 1581 (Fed. Cir. 1994) ("Incidents of sexual harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment."). The appellant, however, failed to show that the alleged abuse was based on the sex of the patients. *See Bates v. Department of Justice*, 70 M.S.P.R. 659, 663 (1996) ("The crucial element of proof in a sexual harassment or sex discrimination case, namely that the employee was discriminated against because of her sex, is missing in this case."). Because the appellant has not presented new and material evidence nor established that the administrative judge's findings with respect to his affirmative defenses were based on an erroneous interpretation of statute or regulation, we DENY the appellant's cross petition for review and AFFIRM the administrative judge's findings concerning the appellant's affirmative defenses. 5 C.F.R. § 1201.115.

Denial of the WGI.

¶9 Although the administrative judge noted that the agency's evidence in support of its withholding of the WGI was particularly strong, ID at 19, he reversed the agency's decision because the agency did not present evidence to establish that its performance appraisal system had been approved by OPM. ID at 4; *see, e.g.*, *Callan v. Department of the Navy*, 26 M.S.P.R. 6, 9 (1984) (an agency is required to prove OPM approval of its performance appraisal system as part of its case when an employee appeals the denial of a WGI). Along with its petition for review, the agency submitted evidence that OPM approved its performance appraisal system in 1986. PFR File, Tab 1, OPM approval letter.

¶10 Normally, we would not consider this evidence because the agency has not demonstrated that it was not available before the record was closed despite the agency's due diligence. *See* 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The agency, however, was not aware that OPM-approval of its performance appraisal system would be an issue in this appeal until the administrative judge issued the initial decision. The appellant did not attempt

to contest the withholding of the WGI on this basis, and the administrative judge did not identify this issue in the memorandum that summarized the prehearing conference. IAF, Tab 28. Because the agency was not on notice that OPM approval of its performance appraisal system would be a dispositive issue in this appeal prior to the issuance of the initial decision, we will consider the evidence the agency provided with its petition for review in this case. *Cf. De Laet v. Office of Personnel Management*, 70 M.S.P.R. 390, 394-95 (1996) (retiree was entitled on remand to submit a new, certified individual retirement record where the evidence strongly suggested that the retiree could have, and would have, obtained the necessary document, had he known it was needed); *Saturley v. Department of the Army*, 69 M.S.P.R. 522, 526 (1996) (where the administrative judge's acknowledgment order provided no guidance as to what proved to be a crucial issue in the appeal, the Board considered evidence submitted for the first time with the appellant's petition for review).

¶11 An appraisal system is "a framework of policies and parameters established by an agency as defined at 5 U.S.C. § 4301(1) ...." 5 C.F.R. § §430.203, 204. OPM is responsible for reviewing and approving an agency's performance appraisal system. 5 C.F.R. § 430.210. Congress provided for this arrangement in Chapter 43 of Title 5, "Performance Appraisal" when it passed the Civil Service Reform Act of 1978. *See, e.g., Wells v. Harris*, 1 M.S.P.R. 208, 214-16, 230 (1979), *modified in part on other grounds, Gende v. Department of Justice,* 23 M.S.P.R. 604 (1984).[*]

---

[*] In *Wells*, the Board reviewed regulations issued by OPM which provided for "unacceptable performance" actions where an agency did not have an approved performance appraisal system. The Board concluded that OPM's 1979 interim and final regulations for implementing 5 U.S.C. § 4303 were in violation of 5 U.S.C. § 4303(a) because they did not require "unacceptable performance" to be determined under a §4302 appraisal system that had been reviewed and approved by OPM pursuant to §4304(b). *Wells v. Harris,*.1 M.S.P.R. at 240-41.)

¶12 In the Civil Service Reform Act, Congress "re-established the connection between performance appraisals and within-grade pay raises based on ALOC [acceptable level of competence] determinations that had been broken by the Federal Salary Reform Act of 1962." *Parker v. Defense Logistics Agency*, 1 M.S.P.R. 505, 523 (1980). In subsequent cases, such as *Callan v. Department of the Navy*, 23 M.S.P.R. 6 (1984), the Board remanded the appeal to the administrative judge on the issue of whether the agency could establish that it had OPM approval of its performance appraisal system. In *Griffin v. Department of the Army*, 23 M.S.P.R. 657, 663 (1984), the Board found that presiding officials (administrative judges) could require proof of an OPM-approved appraisal system, to be admitted and considered at any time during the proceeding below. Since that time, Board procedure has required that administrative judges routinely notify agencies to produce evidence of OPM's approval of the performance appraisal system.

¶13 While the agency's burden of proof was an important element in the early implementation of the new law, this case provides an opportunity to revisit the merits of continuing the current Board policy. Twenty years have passed since the enactment of the Civil Service Reform Act. There is no statutory requirement for renewing approval of an agency's performance appraisal system once in place, and we are unaware of any agency which has not received OPM approval of its performance appraisal system. Therefore, we conclude that it is no longer necessary to perpetuate an outmoded paperwork requirement. However, if an appellant alleges that there is reason to believe that an agency is not in compliance with the law, the Board may require an agency to submit evidence that it has received OPM approval of its performance appraisal system.

¶14 An employee is entitled to receive a WGI if he or she is performing at the "fully successful" level or better at the end of the statutory waiting period. 5 U.S.C. § 5335(a) (an employee is entitled to a periodic step increase so long as

he or she has completed the applicable waiting period, has not received an equivalent increase in his or her rate of basic pay during the waiting period, and is performing at an acceptable level of competence); 5 C.F.R. § 531.404(a) (for purposes of granting or denying a WGI, "acceptable level of competence" means "fully successful" or better). The agency must support its decision to withhold a WGI by substantial evidence, i.e., "the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other persons might disagree." 5 C.F.R. § 1201.56(a)(1)(i), (c)(1).

¶15 Although the administrative judge did not discuss the appellant's performance for the purpose of reaching the merits of the agency's acceptable level of competence (ALOC) determination, he did discuss it when he evaluated the appellant's reprisal and retaliation claims. ID at 10, 14, 19. In rejecting these claims, the administrative judge stated that the agency presented strong evidence of the appellant's poor performance in the job elements of "Communications/Public Relations" and "Administrative/Clerical Functions." *Id*. We agree with the administrative judge's evaluation of this evidence and find that it constitutes substantial evidence that the appellant was not performing the duties of his position at a "fully successful" level at the end of the statutory waiting period for the WGI. 5 U.S.C. § 7701(c)(1)(A); 5 C.F.R. § 1201.56(a)(1)(i). We therefore REVERSE the initial decision with respect to this issue and SUSTAIN the agency's decision to withhold the WGI for which the appellant became eligible on October 27, 1996.

ORDER

¶16 We ORDER the agency to cancel the appellant's removal and to restore the appellant effective December 13, 1996. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶17 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶18 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶19 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶20 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, http:\\www.mspb.gov.

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF VICE CHAIR BETH S. SLAVET

in

Roger Daigle v. Department of Veterans Affairs,
Docket Nos. NY-0752-98-0362-I-1, NY-531D-99-0085-I-1

¶1 I agree with the conclusion reached by the majority in the adverse action appeal, Docket No. NY-0752-98-0362-I-1. However, I would simply deny the agency's petition for review in that case for failure to meet the criteria for review. 5 C.F.R. § 1201.115.

¶2 I do not agree with all of the statements in the majority's opinion in the within-grade increase appeal, Docket No. NY-531D-99-0085-I-1, although I agree with the result the majority reaches. Specifically, I would not hold that it is an "outmoded paperwork requirement," *see* Majority Opinion, ¶ 12, to make an agency prove, in support of a performance-based action, that its performance appraisal system has been approved by the Office of Personnel Management (OPM). The majority may be right that 21 years after the passage of the Civil Service Reform Act of 1978 there is no agency "which has not received OPM approval of its performance appraisal system," *see id.*, but I would not assume that performance appraisal systems remain static once approved by OPM, especially considering that the executive branch has undergone two formal "reinvention" efforts since 1993. While the majority is correct that "renewal" of OPM approval is not necessary for an existing system, *see id.*, it appears that OPM approval must be obtained for changes to a performance management system which "affect a provision" that is "covered by regulation." Petition for Review File, Tab 1 (Aug. 29, 1986 letter from OPM to the agency); *see also Satlin v. Department of Veterans Affairs*, 60 M.S.P.R. 218, 222 (1993) (discussing OPM requirement that changes to a performance appraisal system be submitted to OPM for approval if the changes "would affect a provision covered by statute or regulation"). Based on the above, I would not modify longstanding Board

doctrine that an agency must prove, as an element of a performance-based action, that its performance appraisal system was approved by OPM.

¶3 Normally the Board will not grant a petition for review on the basis of evidence that was not presented to the administrative judge in the absence of a showing that the evidence is both material, and was unavailable before the record closed below despite the party's due diligence. *See* 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). However, in the present case, the administrative judge did not advise the agency prior to the hearing that it was required to prove that its performance appraisal system had been approved by OPM. *See* Initial Appeal File, Tab 28 (summary of prehearing conference). On this basis, I would reopen the appeal to consider the agency's evidence submitted for the first time on review that in 1986 OPM approved its performance appraisal system. *See* Petition for Review File, Tab 1 (Aug. 29, 1986 letter); *see also Satlin*, 60 M.S.P.R. at 222 (in a performance-based action, the Department of Veterans Affairs established that OPM had approved its performance appraisal system); *cf. Jackson v. U.S. Postal Service*, 74 M.S.P.R. 20, 23 (1997) (the Board considered material evidence submitted for the first time on review where the party making the submission was not given explicit guidance below of what evidence he needed to submit). The appellant has filed a detailed response to the agency's petition for review, but he does not allege, or even imply, that since 1986 the agency has made changes to its performance appraisal system of the sort that require OPM approval. Accordingly, I would find that the agency met its burden of showing OPM approval of its performance appraisal system.

¶4 I concur in the results reached by the majority in these appeals.

December 28, 1999
Date

_____
Beth S. Slavet
Vie Chair